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Recent Illinois Decisions

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APPEAL AND ERROR—REVIEW—WHETHER OR NOT IT IS REVERSIBLE ERROR FOR DEFENDANT'S COUNSEL, IN A PERSONAL INJURY SUIT, TO INFORM THE JURY THAT THE DEFENDANT IS NOT COVERED BY INSURANCE—The plaintiff, in the recent case of *Humkey* v. *Hueslmann Quarry, Inc.*,[1] sued to recover for personal injuries sustained in a motor vehicle collision. Counsel for defendant, during his opening statement, informed the jury that the defendant was not covered by insurance. The plaintiff objected to this remark and moved for a mistrial, but the trial court overruled the objection and denied the motion. The jury thereafter rendered a verdict in favor of the defendant and judgment was granted thereon. The plaintiff appealed to the Appellate Court for the Fourth District, claiming error in the ruling aforementioned. The Appellate Court agreed that error had been committed and, reversing the judgment, remanded the case for further proceedings.

Illinois courts, because of the potential prejudice likely to exist, have generally held that it is error for a plaintiff to introduce evidence that a defendant involved in a personal injury case is insured against liability for harm done.[2] The only exception to that rule would seem to be one which permits the interrogation of prospective jurors, after a proper showing, as to a possible financial connection with an insurance company or companies,[3] since an answer thereto might reveal cause for challenge. The instant case is of particular importance because it represents the first time, with the possible exception of the decision in *Smith* v. *Raup*,[4] that a reviewing court of Illinois has been called upon to determine the opposite type of situation, one in which the defendant seeks to inform the jury that he was not covered by insurance. The court based its holding

1 343 Ill. App. 377, 99 N. E. (2d) 351 (1951).

2 Smithers v. Henriquez, 368 Ill. 588, 15 N. E. (2d) 499 (1938), noted in 16 CHICAGO-KENT REVIEW 371; Kavanaugh v. Parret, 379 Ill. 273, 40 N. E. (2d) 500 (1942), noted in 20 CHICAGO-KENT LAW REVIEW 371; Kelly v. Call, 324 Ill. App. 143, 57 N. E. (2d) 501 (1944).

3 Edwards v. Hill-Thomas Lime & Cement Co., 378 Ill. 180, 37 N. E. (2d) 801 (1941); Bellomy v. Bruce, 303 Ill. App. 349, 25 N. E. (2d) 428 (1939). But see Wheeler v. Rudick, 397 Ill. 438, 74 N. E. (2d) 601 (1947), noted in 36 Ill. B. J. 250.

4 296 Ill. App. 171, 15 N. E. (2d) 939 (1938). The defendant there was called by the plaintiff as an adverse witness and, during the course of this examination, he testified, without objection, that after the accident plaintiff had asked him if he carried insurance. Upon direct examination, defendant testified that, when plaintiff had asked him this question, he had replied in the negative. The Appellate Court for the Second District held that no reversible error had occurred. There is dictum in the opinion which might seem to indicate that the court favored the idea of having a defendant inform the jury that he possessed no insurance. Even if error had occurred, plaintiff was in no position to complain since he had invited the same.

on the theory that to permit introduction of the question of the presence or absence of insurance into a personal injury action necessarily places one party under a handicap and gives to the other an advantage, which handicap and advantage have no place in the trial of a case. The decision represents no more than a logical extension of the rule previously noted as to plaintiffs. It leaves the fundamental policy question, one concerning whether or not it would be appropriate to make the insurance carrier a party defendant in every such case, untouched to await legislative consideration.

CHARITIES—CONSTRUCTION, ADMINISTRATION AND ENFORCEMENT—WHETHER OR NOT FUNDS OBTAINED BY A CHARITABLE ORGANIZATION THROUGH LEVY OF ASSESSMENTS AND DUES CONSTITUTE NON-CHARITABLE FUNDS—In the late case of *Slenker* v. *Gordon*,[1] the plaintiff sued the Grand Lodge of the State of Illinois of the Independent Order of Odd Fellows to recover for personal injuries sustained when his automobile was struck by another car negligently driven by Gordon who, at the time of the accident, was performing duties for the corporate defendant within the scope of his agency. Judgment for the corporate defendant, notwithstanding a verdict for the plaintiff, was entered by the trial court on the ground that the Grand Lodge was a charitable corporation possessed solely of trust funds, hence was immune to judgment. The Appellate Court for the Second District, on the record before it in an appeal taken by the plaintiff, affirmed such judgment. Counsel for the plaintiff had admitted that the corporate defendant was created solely for charitable purposes, thereby recognizing the immunity extended in Illinois to the trust funds of such organizations. It was his contention, however, that certain of the funds of the corporate defendant, having been raised by assessment imposed upon its members under penalty of expulsion if not paid, could not be classified as a part of the charitable funds. The Appellate Court held that it was not the source from which the fund was derived, nor the manner of its acquisition, which was to be deemed important but that it was the end purpose to which the fund was to be devoted that controlled the issue. As the funds in question were ultimately to inure to the benefit of charity, except that part necessary to pay the administration expenses, it was held that they came within the scope of the immunity.

In the earlier Illinois case of *Moore* v. *Moyle*,[2] where another charitable organization had been sued for the negligence of one of its employees, the Illinois Supreme Court circumscribed the immunity theory by finding

1 344 Ill. App. 1, 100 N. E. (2d) 354 (1951). Leave to appeal has been denied.
2 405 Ill. 555, 92 N. E. (2d) 81 (1950).

the charity in question to be possessed of non-charitable assets consisting of the proceeds of certain liability insurance policies. Following upon that decision, there was an expression of some degree of belief that Illinois courts would begin to designate other funds, such as general operating funds or moneys collected by way of assessment of mandatory fees, as being "noncharitable,"[3] or might even join the modern trend now turning in the direction of liability, rather than immunity, for wrongdoing.[4]

The decision in the Slenker case, together with denial of leave to appeal therein, would tend to belie that hope, for it would seem as if all funds of a charitable institution are to be considered exempt from tort liability if those funds, no matter how raised, are to be utilized for the furtherance of the general charitable purposes of the organization. Few other cases exist on this point, but two holdings, one from Georgia and one from Tennessee, have passed on the issue. In the Georgia case of *Morton* v. *Savannah Hospital*,[5] it was said that if a hospital receives, or has due to it, money from *paying* patients, *such* money does not constitute part of the charitable trust fund. The Tennessee case of *Hammond Post* v. *Willis*[6] would subject all *general operating funds* to execution. These cases would, at least, give heed to the source of the funds, separating those paid under compulsion from those voluntarily donated to the charity.[7] In the light of the instant case, since the typical Illinois charitable or eleemosynary organization utilizes all cash receipts in the furtherance of its charitable purpose, after extracting enough to pay its operating expenses, about the only potential non-trust asset such an organization could be said to possess would take the form of insurance coverage. In the absence thereof, there would seem to be little hope of securing a recovery from the corporate charity.

3 DeFeo and Spencer, "After Moore v. Moyle: Then What?" 29 CHICAGO-KENT LAW REVIEW 107 (1951), particularly p. 117.

4 The recent case of Haynes v. Presbyterian Hospital Association, 241 Iowa 1269, 45 N. W. (2d) 151 (1950), represents a complete reversal of the doctrine previously followed in Iowa. Even more recently, in Durney v. St. Francis Hospital, Inc., — Dela. Super. —, 83 A. (2d) 753 (1951), a court of that state was asked, for the first time, to consider and adopt the immunity doctrine but refused to accept or apply it. The states of New Mexico and South Dakota would appear to be the only ones left in which the issue has not yet been raised: 28 CHICAGO-KENT LAW REVIEW 107 at 109, particularly note 8.

5 148 Ga. 438, 96 S. E. 887 (1918).

6 179 Tenn. 226, 165 S. W. (2d) 78 (1942).

7 In Summers v. Chicago Title & Trust Co., 335 Ill. 546, 167 N. E. 777 (1929), it was said that a "school charging tuition or fees" did not, thereby, lose its character as a "charitable institution." See also Hogan v. Chicago Lying-In Hospital, 335 Ill. 42, 166 N. E. 461 (1929). Charity, however, has generally come to be regarded as the free-will offering or donation of money or services.

CRIMINAL LAW—EVIDENCE—WHETHER OR NOT THE RESULTS OF A BREATH TEST TO DETERMINE THE PRESENCE OF INTOXICATION WOULD BE ADMISSIBLE OPINION EVIDENCE IN A CRIMINAL CASE—The Appellate Court for the First District, in the recent case of *People* v. *Bobczyk*,[1] was confronted with a question concerning the admissibility in evidence of expert testimony based on the result of a test performed on a device known as a Harger Drunkometer, one used to test the alcoholic content of the subject's breath. The defendant there involved had been charged with driving an automobile while intoxicated. He appeared to have voluntarily submitted to the Harger test, which test revealed a sufficiently high concentration to support the belief that the defendant was then intoxicated. At the trial on such charge, the defendant contended that the results of the test were inadmissible evidence as the device used had not received general scientific recognition as providing an accurate index of the amount of alcohol in the blood. After testimony as to the underlying theory of the test and of its probabilities of accuracy, given by the inventor and by a toxicologist, the trial court admitted the evidence and the defendant was convicted. On his appeal, the Appellate Court for the First District affirmed the conviction, stating that any lack of unanimity of the medical profession as to whether or not the presence, and degree, of intoxication could be determined from a person's breath went to the weight and not to the admissibility of expert testimony based on such a breath test.

The problem presented appears to be the first of its kind to be passed upon by a reviewing tribunal in Illinois and there is very little authority to be found in other jurisdictions. What few reported cases exist seem to provide a definite split of opinion over the subject. In the Texas case of *McKay* v. *State*,[2] cited by the court as authority, the results of the Harger test were there admitted upon the same ground as stated in the principal case. In the Michigan case of *People* v. *Morse*,[3] however, the results of the test were excluded on the basis that the test lacked general scientific recognition to date. It would be difficult to formulate a general rule on the point, in view of the limited number of cases, but there would seem to be a trend toward admitting the results of various tests relating to alcoholism[4] in the absence of a possible objection on constitutional grounds because of the element of self-incrimination involved in ad-

1 343 Ill. App. 504, 99 N. E. (2d) 567 (1951). An extensive study of various tests relating to intoxication appears in Ladd and Gibson, "The Medico-Legal Aspects of the Blood Test to Determine Intoxication," 24 Iowa L. Rev. 191 (1939).

2 — Tex. —, 235 S. W. (2d) 173 (1950).

3 325 Mich. 270, 38 N. W. (2d) 322 (1949).

4 See annotation in 127 A. L. R. 1513 to Kuroske v. Aetna Life Ins. Co., 234 Wis. 394, 291 N. W. 384 (1940).

ministering the test. This last objection had been raised in the cases of *State* v. *Morkrid*[5] and *State* v. *Duquid*[6] but in each instance the objection had been overruled as the record did not sustain the contention that the test had been coerced.

During the past fifty years there has been a noticeable inclination on the part of courts to admit into evidence the results of scientific tests designed to aid in the proof of criminal cases. Among forms of evidence now recognized are tests based on fingerprints,[7] palm prints,[8] ballistics studies,[9] microanalysis,[10] and photomicrographs.[11] In the light thereof it would not seem unreasonable to utilize scientific tests tending to prove the presence of intoxication provided a proper foundation is laid through a showing of the probability of accuracy, a demonstration that the results have been diligently and carefully recorded, and provided also it is made apparent that the defendant has voluntarily submitted to the test.[12]

JOINT TENANCY—SEVERANCE—WHETHER OR NOT A JUDGMENT SALE OF THE INTEREST OF ONE JOINT TENANT WILL OPERATE TO SEVER THE JOINT TENANCY PRIOR TO THE EXPIRATION OF THE PERIOD OF REDEMPTION—In the recent case of *Jackson* v. *Lacey*,[1] the Illinois Supreme Court dealt with the effect, prior to the period of redemption, of a bailiff's sale of the interest of one joint tenant, pursuant to a judgment lien which had attached thereto. The purchaser, who was the other joint tenant, received a certificate of purchase, but died before the period of redemption had expired and a deed could be issued. Thereafter, the first joint tenant, whose interest had been sold, quitclaimed his rights to the defendant. A suit for partition brought by the plaintiffs, heirs-at-law of the deceased judgment purchaser, was dismissed by the trial court. Appeal was taken directly to the Supreme Court, which affirmed the decree of the trial court, holding that the unities of title were not destroyed so long as a right to possession remained, and that the joint tenancy had not been severed by a

5 — Iowa —, 286 N. W. 412 (1939).

6 50 Ariz. 276, 72 P. (2d) 435 (1937).

7 People v. Jennings, 252 Ill. 534, 96 N. E. 1077 (1911).

8 State v. Kuhl, 42 Nev. 185, 175 P. 190 (1918).

9 People v. Fisher, 340 Ill. 216, 172 N. E. 743 (1930).

10 People v. Wallage, 353 Ill. 185, 175 P. 190 (1918).

11 People v. McDonald, 365 Ill. 233, 6 N. E. (2d) 182 (1936).

12 The defendant in the principal case contended that the test was not voluntarily taken, hence the use of the evidence amounted to a denial of his privilege against self-incrimination. The court disposed of the point on the ground that the defendant, by taking the case to the Appellate Court and by assigning error over which that court had jurisdiction, had waived the constitutional question. On that score, see People v. Terrill, 362 Ill. 61, 192 N. E. 734 (1935).

1 408 Ill. 530, 97 N. E. (2d) 839 (1951).

judicial sale which had not yet materialized into a valid deed of the debtor's interest.

Previously, the court had held that a joint tenancy would not be severed by the mere attachment of a judgment lien upon the interest of one joint tenant,[2] or by a levy thereon,[3] but that severance would result through the issuance of a sheriff's deed,[4] or through a compulsory transfer under a request for specific performance.[5] By its decision in the instant case, the court has now substantially narrowed, for Illinois, the confines within which the relationship of joint tenancy will be destroyed through the process of enforcing a judgment upon the interest of one of the tenants. There is reason to believe that, in this state, nothing short of the expiration of the period of redemption and the issuance of a deed will suffice to destroy the joint arrangement.

SCHOOLS AND SCHOOL DISTRICTS—PUBLIC SCHOOLS—WHETHER THOSE ENGAGED IN TRANSPORTATION OF SCHOOL CHILDREN TO AND FROM SCHOOL MUST EXERCISE THE HIGHEST DEGREE OF CARE FOR SAFETY OF PUPILS CONVEYED—In the case of *Van Cleave* v. *Illini Coach Company*,[1] the plaintiff, a school child, had been injured while a non-paying passenger on defendant's bus when, due to a sudden lurch of the bus, another child passenger was thrown upon the plaintiff. The defendant carrier operated under a contract with the school district to carry its pupils to and from school. The prime issue in the case concerned the degree of care required of the defendant carrier in transporting children, the defendant relying on the claim that its duty was to exercise no more than ordinary care. The trial court, however, found the defendant guilty of negligence and, on appeal, the Appellate Court for the Third District affirmed the decision.

As a general rule, courts have consistently held that private carriers are guilty of negligence, causing actionable injury to their passengers, only when they have not exercised ordinary care.[2] Common carriers, on the other hand, have always been required to exercise the highest degree of care in the transportation of their passengers.[3] In the instant case, the

2 People's Trust & Savings Bank v. Haas, 328 Ill. 468, 160 N. E. 85 (1928).

3 Van Antwerp v. Horan, 390 Ill. 449, 61 N. E. (2d) 358 (1945), noted in 24 CHICAGO-KENT LAW REVIEW 205.

4 Johnson v. Muntz, 364 Ill. 482, 4 N. E. (2d) 826 (1936).

5 Spadoni v. Frigo, 307 Ill. 32, 138 N. E. 226 (1923).

1 344 Ill. App. 175, 100 N. E. (2d) 398 (1951).

2 Payne v. Halstead, 44 Ill. App. 97 (1892). But see also Ill. Rev. Stat. 1949, Vol. 2, Ch. 95½, § 58a, as to liability for injury to a non-paying guest automobile rider.

3 Coulton v. Illinois Central R. Co., 264 Ill. 414, 106 N. E. 1049 (1914).

court likened the duty of persons engaged in the transportation of school children to be the equivalent of that imposed on common carriers. Lacking any precedent in Illinois bearing directly on this point, the court turned to the Washington case of *Webb* v. *City of Seattle*[4] for support. It is important to note that in neither the instant case nor in the Washington case does the court support the conclusion attained with any reasoning leading to a belief that those engaged in the transportation of school children should be held to the highest degree of care. In fact, in the instant case, the court goes so far as to state that whether the defendant was a common or private carrier was not to be deemed a controlling feature. If there is justification for this departure from a long-established distinction, it must, in all probability, lie in the fact that the court felt the very nature of the occupation, to-wit: carriage of school children, particularly those of tender years, called for the exercise of the highest degree of care. In all events, the decision, if upheld, would seem to open the door to the possibility of bringing cases involving the transportation of other varied classes of passengers under this unique rule. If so, economic and other factors which have supported prior classifications, with their attendant duties, will no longer afford sufficient ground for the making of future distinctions as to the bases for liability.

WILLS—RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES—WHETHER OR NOT A SPOUSE, BY CONTINUING TO ACT AS EXECUTOR AFTER RENOUNCING THE WILL, HAS WAIVED THE RENUNCIATION THEREOF—The testatrix, in the case of *In re Donovan's Estate,*[1] provided that her husband should be one of three named executors and further that he should be given certain bequests and devises. The husband, shortly after being appointed co-executor, filed a renunciation of the will but continued to act as co-executor. Subsequently the other co-executors filed a partial report in which they alleged that the husband, by continuing to act as co-executor, had waived his prior renunciation. The probate court sustained the husband's objections and dismissed the report. Upon appeal to the circuit court, for trial *de novo,* the partial report was approved. On direct appeal to the Illinois Supreme Court because a freehold was involved, the decision of the circuit court was reversed and the report was dismissed, the court holding that the husband's action in continuing to act as executor had not operated to nullify the renunciation of the will.

The court, in arriving at the foregoing conclusion, first ascertained that the effect of a renunciation was to reject the beneficial provisions of

[4] 22 Wash. (2d) 596, 157 P. (2d) 312 (1945).

[1] 409 Ill. 195, 98 N. E. (2d) 757 (1951).

the will and to treat the same as if they had been obliterated therefrom,[2] for the statute provides that the renunciation shall operate to bar the spouse from any claim under the beneficial provisions of the will.[3] Such being the consequence of a renunciation, it has been uniformly held that, once filed, the renunciation must stand and may be withdrawn only by order of court.[4] The query in the case, therefore, became one as to whether or not the husband had engaged in such a series of acts as would warrant a court in arriving at the conclusion that the renunciation should be ordered withdrawn by reason of an estoppel growing from the husband's conduct in serving as co-executor. In that regard, the court indicated that the husband was related to the will in question in two different capacities, to-wit: as beneficiary and as executor. Conduct in one capacity, that is by way of renunciation filed by him as beneficiary, could not operate to create an estoppel against the same individual in his different capacity as executor, particularly since no one was harmed, as to the latter capacity, by anything done in relation to the former. To support a claim of estoppel, of course, it must appear that the conduct relied on invoked some form of harm.[5] If the husband, in his capacity as husband, had obtained more than he would have been legally entitled to receive, there would have been some basis for the assertion of an estoppel, for injury would then be apparent.[6] As, however, he gained a right to nothing beyond his statutory share, no injury had been done. Anything claimed by him in his capacity as co-executor, such as commissions and the like, would come to him by right of law rather than under the will, hence would amount to no more than a proper expense of administration, which could afford no basis for a claim of estoppel.

While there can probably be no criticism addressed either to the reasoning followed or to the result attained, the decision suggests the advisability of using appropriate language in a will to offset the possibility of a spouse electing to renounce the beneficial provisions thereof yet insisting on the right to serve in the capacity of executor in case he or she should have been so designated. If that is not what the testator desires, a few words would serve to disable the renouncing spouse from acting in any capacity under the will.

2 Sueske v. Schofield, 376 Ill. 431, 34 N. E. (2d) 399 (1941).

3 Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 169.

4 Hanson v. Clark, 246 Ill. App. 496 (1927). See also 14 Am. Jur., Dower, p. 781.

5 Canavan v. McNulty, 328 Ill. 388, 159 N. E. 782 (1927).

6 Kerner v. Peterson, 368 Ill. 59, 12 N. E. (2d) 884 (1937).